Petition

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No. 81-258

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

CURTIS MILSTEAD,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 957, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a labor union which has violated its duty of fair representation to an employee – member may be held liable for all damages that proximately flow from that violation including lost wages and fringe benefits.

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IN THE

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No. ————

CURTIS MILSTEAD,

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v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 957, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioner, Curtis Milstead, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 13, 1981.

OPINION BELOW

The second opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at page 1a. The second judgment of the District Court for the Southern District of Ohio appears in the Appendix at page 4a. The first opinion of the Sixth Circuit Court of Appeals appears in the Appendix at page 5a. The first judgment of the District Court for the Southern District of Ohio appears in the Appendix at page 14a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered May 13, 1981. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Sometime in 1972 Curtis Milstead began working as a casual (no seniority) employee for a local motor freight company. In the spring of 1974 he satisfied the then existing requirements necessary to become a full time employee and thus gained seniority. The company refused to place Milstead on its seniority roster, and in fact, terminated Milstead's employment.

Milstead filed a grievance. The grievance proceeded through the existing grievance/arbitration mechanism as far as the Joint Local Committee level. The evidence in the Court below was more than sufficient to show that the union violated its duty of fair representation to Milstead. The evidence showed that even though Milstead had discussed his grievance with the union officials prior to any grievance hearing, the union failed to investigate the grievance or check the applicability of contractual provisions in preparation for the grievance hearing.

Milstead was not successful in his attempt to win his job through the grievance/arbitration mechanism. So, on April 9, 1975, a complaint was filed in the United States District Court for the Southern District of Ohio alleging breach of contract and breach of duty of fair representation. A jury verdict was returned in favor of Milstead on June 23, 1976.

The jury awarded Milstead $20,000.00 against the union and $10,000.00 against the employer.[1]

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[1] The employer settled with Milstead and is no longer a party to the action.

The union appealed to the United States Court of Appeals for the Sixth Circuit. On August 2, 1978 the Court of Appeals affirmed the determination of liability for breach of duty of fair representation but vacated the award of damages. The case was remanded to the District Court for determination of damages as a proximate result of the breach of duty of fair representation to be determined consistent with the Court's decision.

On retrial Milstead was prevented from presenting any evidence of damages that included backpay, benefits or medical expenses incurred while there was no insurance protection.[2] The second jury awarded Milstead $5,625.00 plus interest at six percent. Milstead appealed. The Court of Appeals for the Sixth Circuit on May 13, 1981 affirmed the decision of the District Court. It is from that decision that Milstead has petitioned this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court below is inconsistent with the decisions of this Court, the Fourth and Fifth Circuit Courts of Appeal and the National Labor Relations Board.

The Sixth Circuit has clearly expressed its belief that the union's exposure to damages is *de minimis* and that the backpay portion of damages suffered by an employee should be paid by the employer. (Appendix pp. 2a-3a). Although this position was arguably supportable under early analyses of *Vaca* v. *Sipes*, 386 U.S. 171; 87 S.Ct. 903 (1967), recent decisions of this Court, the Board and other Circuit Courts of Appeal require a different conclusion.

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[2] This evidence, however, was proffered.

As early as 1969, this Court began to suggest that the liability of the union could include damages for loss of employment where the union's conduct added to the difficulty and expense of collecting from the employer. *Czosek* v. *O'Mara*, 397 U.S. 25 (1969).

In 1975 this Court increased the potential exposure of a union for damages which would include backpay when it held that petitioners were entitled to an appropriate remedy against the employer *as well as the union* in an action for breach of contract and breach of duty of fair representation. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976).

These Supreme Court suggestions of union liability for compensatory damages including backpay culminated in a decision which went to the extreme and set forth the only exclusion from union liability – punitive damages. In *IBEW* v. *Faust*, 442 U.S. 42 (1979) this Court specifically excluded *only* punitive damages from potential union liability while pointing out that the prevailing parties were entitled to compensation for injuries caused by violation of the employee's rights and noted that injunctive relief and damages would be appropriate. This Court further pointed out that Courts would be free in each case to fashion relief which would be appropriate to make an employee whole.

Thus, it is clear from the Supreme Court decisions that a union is liable for compensatory damages and that the only exclusion from such liability is punitive damages. Both the Fourth and Fifth Circuit Courts of Appeal have acknowledged this change in the law in recent decisions. The Fourth Circuit now holds a union to be liable for losses to the extent it participates in or causes the conduct which led to the employee's discharge. *Self* v. *Teamsters*, 620 F.2d 439 (4th C.A. 1980).

The Fifth Circuit Court of Appeals holds a union liable for the difference in earnings an employee actually makes and what the employee would have made but for the conduct of

the union. *Abilene* v. *NLRB*, 104 LRRM 3077 (5th C.A. 1980).

Finally, in 1981 the Board capitulated to the above stated damage analysis and now holds that a union should be required to make an employee whole for all losses of wages and benefits which reverses a long standing Board decision which had limited the union exposure of damages. *Sheet Metal Workers Local 355* (1980-81 NLRB par. 17,836).

Thus, this evolving state of the law together with the obvious conflicts between the Supreme Court decisions, the Fourth and Fifth Circuit Courts of Appeal, the Board and the Sixth Circuit's most recent decision in Milstead justify the grant of certiorari to review the judgment below.

2. This case clearly presents to the Supreme Court of the United States, for the first time, the question of whether a union should be held liable for all damages proximately flowing from its breach of duty of fair representation including backpay, fringe benefits and expenses which would have been covered by fringe benefits but for the violation of the employee's rights.

In the case which this Court is now asked to review, the outstanding question presented is whether a union shall be held liable for damages which would include backpay, fringe benefits and expenses which otherwise would have been covered by fringe benefits as a result of the violation of an employee's rights.

The violation of the employee's rights by the union is the law of the case. There has been no further appeal from that determination. The only question remaining is to what extent should the union be compelled to compensate the prevailing Plaintiff. In the second Milstead trial the lower Court Judge relied upon the Court of Appeals decision in *Faust* to deny

Milstead an opportunity to prove damages beyond his mere costs of pursuing his rights. The Court of Appeals decision in *Faust* has now been reversed by this Court which has pointed out that the award of punitive damages is not consistent with the labor policy of the federal government. However, only the award of punitive damages was reversed. Thus, it is clear that damages, compensatory in nature, which are not punitive damages, are not barred from recovery against the union. In all other cases previously submitted to this Court the question of backpay and other compensatory damages was never squarely presented. Now, for the first time, this Court is presented with an opportunity to rule upon the question of compensatory damages only. There is no longer a disputed issue as to the questions of breach of contract or breach of duty of fair representation.

Thus, this Court should grant certiorari to resolve a central issue that remains unresolved and which has created a conflict among the circuits in determining damages for breach of duty of fair representation.

CONCLUSION

For the reasons which have been aforestated, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

No. 80-3005

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CURTIS MILSTEAD,
Plaintiff-Appellant,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION No. 957, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed May 13, 1981.

Before: EDWARDS, Chief Judge, WEICK, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

PER CURIAM. Curtis Milstead sued his former employer and local union under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, asserting that he had been discharged wrongfully by his employer and that the Union had breached its duty of fair representation by failing to pursue his grievance vigorously. The jury returned a verdict in favor of Milstead for $10,000 against the company and $20,000 against the Union. After the previous appeal to this court, the company settled Milstead's claim against it for $12,000 and is not a party to the present appeal.

On the previous appeal, this court affirmed on the question of the liability of the Union but reversed and remanded for a new trial on the amount of damages. *Milstead* v. *International Brotherhood of Teamsters*, 580 F.2d 232 (6th Cir. 1980). In remanding the case we said:

> [T]here is nothing in the record to support the $20,000 award assessed against the Union . . . . It is . . . possible that the award rendered here included some damages for lost wages. If so, the award clearly is contrary to law since judgment against the Union under the facts of this case can be had only for those damages that flowed from its own conduct. *Vaca* v. *Sipes, supra*, 386 U.S. at 196-198. 580 F.2d at 236.

On remand, Milstead sought to introduce evidence of lost wages and lost fringe benefits. The district court refused to permit the introduction of such evidence and instructed the jury not to consider lost wages and fringe benefits in determining the amount of damages to be awarded against the Union. Milstead was allowed to introduce evidence of attorney's fees, court costs, travel expenses and other costs incidental to his attempts to recover against the Union. The jury returned a verdict of $5,625 against the Union. Milstead appeals. We affirm.

Milstead contends that his damages were caused by the failure of the Union properly to process his grievance, and not by his wrongful discharge by his employer. He argues that the Union was responsible for all his damages, including lost wages, stemming from his discharge. This contention is flatly contrary to the law of this case, as expressed in the above quoted language of the opinion on the former appeal, and is not in accord with the law of this Circuit.

In *St. Clair* v. *Int. Brotherhood of Teamsters*, 422 F.2d 128 (6th Cir. 1969), this court discussed the problem of apportioning damages between an employer wrongfully discharging an employee and a union failing to represent him fairly:

> As the jury found, the union did not procure plaintiff's

discharge. It was the decision of the employer (although the District Court seems not to have decided whether the company's act was wrongful). As the Supreme Court said,

> [D]amages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

Vaca v. Sipes, 386 U.S. 171, 197-198, 87 S.Ct. 903, 920, 17 L.Ed.2d 842 (1967). The calculation of who caused which damages may present serious practical problems, but the Supreme Court has strongly implied that in cases like this, involving a discharge and an alleged failure by the union to take all available steps to remedy the employee's complaint, the increment of damages caused by the union's breach of duty is virtually *de minimis*. "[A]ll or almost all of Owens' [the employee's] damages would still be attributable to the allegedly wrongful discharge by Swift [the company]." Vaca v. Sipes, 386 U.S. at 198, 87 S.Ct. at 921 *Id.* at 132.

Milstead argues that the law on this subject was changed by the decision of the Supreme Court in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), holding that punitive damages for unfair representation could not be recovered in an action against a Union under the Railway Labor Act. The Supreme Court expressly limited its holding to the issue of punitive damages, as demonstrated by the following footnote:

> Our grant of certiorari was limited to the punitive damages question. See 439 U.S 892 (1978). Consequently, for purposes of our analysis, we must take as correct the findings below that IBEW breached its duty of fair representation and that the $40,000 compensatory damages award was proper.
> 442 U.S. at 45, n. 4.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-82

CURTIS MILSTEAD,

Plaintiff,

vs.

I R C & D MOTOR FREIGHT, ET AL.,

Defendants.

JUDGMENT

(Filed November 12, 1979)

This action came on for trial before the Court and a jury, Honorable Carl B. Rubin, Chief United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff Curtis Milstead recover of defendant, International Brotherhood of Teamsters, Local 957 the sum of Five Thousand Six Hundred and Twenty-Five Dollars ($5,625.00), with interest thereon at the rate of Six (6) percent as provided by law.

Dated at Dayton, Ohio, this 12th day of November, 1979.

JOHN D. LYTER
Clerk of Court

By: /s/ REBECCA E. ANDERSON
Deputy Clerk

No. 76-2614

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CURTIS MILSTEAD, *Plaintiff-Appellee,* v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION No. 957, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed August 2, 1978.

Before: PHILLIPS, Chief Judge, WEICK, Circuit Judge, and JOHNSTONE, District Judge.*

JOHNSTONE, District Judge. Plaintiff, Curtis Milstead, sued his former employer and union local under Section 301 of the Labor Management Relations Act,[1] claiming that the defendant IRC&D Motor Freight, Inc., [Company] had wrongfully discharged him and that defendant, Teamsters Local No. 957 [Union], had breached its duty of fair representation in failing to vigorously pursue his grievance. After the Court denied the Union's motion for a directed verdict, the jury found that the Union had breached its duty to Milstead, and assessed damages of $20,000 against it. The jury also found the Company liable and assessed damages of $10,000. Only

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* The Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

[1] 29 U.S.C. § 185.

the Union has appealed. We affirm as to the issue of Union liability but remand to the district court for a proper determination of damages.

Milstead began work for the Company in 1972 on an intermittent basis. His last period of employment for the Company began on March 18, 1974. The complaint alleges that this last period was sufficiently long to entitle Milstead to the benefits of seniority status accruing under § 41(a) of the Central States Area Local Cartage Supplemental Agreement [Local Cartage Agreement].[2] This agreement covered those Company drivers who worked on routes within a twenty-five mile radius of Dayton, Ohio.

The Local Cartage Agreement was supplemented by the Air Freight Rider Agreement [Air Freight Agreement] which applied specifically to those employees making deliveries to and

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[2] That section reads in pertinent part:

(a) *A new probationary employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial basis, during which period he may be discharged without further recourse;* provided, however, that the employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members.

(1) *Any new employee must work thirty (30) cumulative work days within any ninety (90) calendar day period and upon completion thereof, shall be considered a regular employee and placed on the seniority list.* Such employee's seniority date for all purposes shall be established as of the first day worked in such ninety (90) calendar day period in which he meets the requirement aforementioned.

(2) *Any day worked, regardless of whether or not* [*sic*] *he was used as a replacement shall be counted in determining whether or not* [*sic*] *he has qualified under the above provisions.* A man can gain seniority by qualifying under the above provisions only. (Emphasis added)

from the Dayton airport. During the 1967-1973 period, the Air Freight Agreement contained a provision which required the Company to maintain separate seniority lists as to each "contract group" of employees. In effect, this provision meant that time spent under one contract could not be transferred and added to the days worked under another.

When the Air Freight Agreement was renegotiated in 1973 to cover the years 1973 through 1976, the provision containing the requirement of separate seniority listing was omitted. This gave the impression (at least on the face of the contract) that time spent under different contracts could be accumulated for gaining "regular employee" status. Some testimony at the trial, however, indicated that the provision was omitted inadvertently and that the Union and the Company had agreed informally to continue the seniority provision. Milstead worked 44 or 45 days during the March 18, 1974, through May 31, 1974, period. At trial, the essence of the dispute between the Company and Milstead was whether any of those days could be properly deducted so as to deprive Milstead of the job security afforded by seniority listing. Although not directly in issue here, it is necessary to explore the history of Milstead's employment with the Company to more fully understand the Union's duty of fair representation.

From March 18 through May 7, Milstead worked either 29 or 30 days. He testified that approximately five of those days were spent on the Air Freight route and the remainder on Local Cartage. The Company insisted that these five days could not be included for seniority listing purposes under the Local Cartage Agreement since separate seniority lists were maintained for each route. Milstead claimed that these Air Freight days could not be deducted since the Air Freight Agreement did not contain the provision requiring separate seniority listing.

On May 10, 1974, Milstead contacted the Company and asked whether any more work was available. He was told that he could not work without signing a 1974 Summer Re-

placement Waiver form.[3] If the form were not signed, any additional work by Milstead would have resulted in his attaining employee status. Believing that he had already accumulated sufficient time for such status, Milstead signed the form.[4]

Milstead worked 15 days throughout the remainder of May. On May 30, he was informed by the Company that it had no further need of his services. Milstead replied that he had already achieved regular employee status during the March 18 – May 7 period. But the Company again asserted that he did not have the requisite 30 days under the Local Cartage Agreement since the time worked on Air Freight routes could not be included.

Having viewed the factual background of the events leading to the Company's dismissal of Milstead, we now turn to examine the process by which his grievance was denied. The Union received the grievance on June 6, 1974. After an attempt to informally reconcile the issue with the Company,

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[3] The form reads in pertinent part: "Employees hired between May 1st and October 1st as replacements for vacation or absenteeism will not accumulate or obtain seniority." This provision apparently waives the employee rights accorded under § 41(a)(2) of the Local Cartage Agreement, cited *supra* at n.1.

[4] Two days after Milstead signed the Waiver form, its use came under attack at a Union membership meeting. A majority of those present voted to terminate the use of the waiver. The Union leadership responded to the vote by placing the matter on the agenda for the next meeting of the Dayton Joint Local Grievance Committee [Joint Committee]. On June 12, 1974, the Joint Committee rescinded the use of the Waiver.

Milstead claims that the termination of the agreement was retroactive and that the days worked by him after May 10 should have entitled him to regular employee status. The failure of the Union to argue this point before the Joint Committee was an alleged breach of its duty of fair representation. Because we decide this appeal on other grounds, the merits of that contention will not be reached.

the matter was placed on the agenda for the Joint Committee meeting scheduled for June 12.[5] At the meeting, Union business agent Sherman Brown presented an argument in Milstead's behalf. Milstead then spoke at length, reading from the text of his grievance.[6]

At the conclusion of Milstead's presentation, his claim to regular employee status was challenged on the basis of the separate seniority listing arrangement which presumably covered those employees working on the Local Cartage and Air Freight routes. This challenge was not answered. Brown testified at the trial that he was unaware at that time that Milstead had worked on both routes, and that his ignorance of the fact was attributable to Milstead's failure to inform him prior to the meeting. There was, however, some uncertainty regarding the currency of the Air Freight Agreement (which presumably contained the separate seniority provision). The Joint Committee thus decided to render a conditional decision which affirmed the grievance if the Company were unable to establish the currency of the Air Freight Agreement. Shortly thereafter, a Company representative delivered to Brown a copy of the Air Freight Agreement. Brown reviewed the document with Milstead but apparently did not notice the absence of language pertaining to the establishment of separate seniority listings. Brown then referred Milstead to another employer.

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[5] The processing of grievances through the Joint Committee is sanctioned by the National Master Freight Agreement. Its membership is comprised of Union and employer representatives.

[6] This particular grievance was not presented to the Joint Committee prior to the hearing. Milstead had been told by his Union representative that the grievance statement was too lengthy, and that it should be reserved for oral presentation at the hearing. Milstead accepted this advice, and submitted a shorter grievance which merely stated that he was entitled to regular employee status based upon the total number of days which he had worked. As authority, Milstead cited § 41(a) of the Local Cartage Agreement. See n.2, *supra*.

With these facts as a background, we now address the district court's denial of the Union's motion for a directed verdict. In considering a motion for a directed verdict under Rule 50(a), the trial court "must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury." *O'Neill* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). As applied in this context, "sufficient evidence" is such that, when viewed in the light of those inferences most favorable to the nonmovant, *Galloway* v. *U.S.*, 319 U.S. 372, 395, 63 S.Ct. 1077, 1089 (1943), and *Dowdell* v. *U. S. Industries*, 495 F.2d 641, 643 (6th Cir. 1974), there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ. *Sulmeyer* v. *Coca-Cola Co.*, 515 F.2d 835, 841 (5th Cir. 1975), *cert. denied* 424 U.S. 934, 96 S.Ct. 1148 (1976), *citing* 5A Moore's Federal Practice ¶ 50.02[1] (2d ed. 1974). Appellate courts apply this same standard. *O'Neill* v. *Kiledjian*, *supra* at 513, *citing* 9 Wright & Miller, Federal Practice and Procedure § 2524, at 542 (1971).

Milstead contended that the Union should have thoroughly scrutinized the Air Freight Agreement to determine whether there was any provision which authorized the maintenance of separate seniority listings. Since we conclude that there was sufficient evidence upon which this allegation could be submitted to the jury, it is unnecessary to reach the merits of other issues raised by counsel.

"The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Vaca* v. *Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909-910 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 368 (1964). A breach of that duty occurs only when a union's conduct toward an individual member is arbitrary, discriminatory, or in bad faith. *Vaca* v. *Sipes*, *supra* at 177, 87 S.Ct. at 910. Bad faith is not, however, a necessary element of proof when alleging arbitrary or discriminatory

conduct by a union. *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 310 (6th Cir. 1975). In some instances, it is necessary to show only that the union has processed a grievance in a perfunctory fashion. *Vaca* v. *Sipes, supra* at 194, 87 S.Ct. at 903; *St. Clair* v. *Local 515*, 422 F.2d 128, 130 (6th Cir. 1969). Certainly the duty of fair representation may be breached whenever a union ineptly handles a grievance because it is ignorant of those contract provisions having a direct bearing on the case.

In the case before us, it appears that there was more than sufficient evidence presented at trial which tended to show that the Union's duty was not fulfilled. Union business agent Sherman Brown testified that he was unable to counter the Joint Committee's challenge to Milstead's seniority claim because Milstead had failed to inform him about his work on Air Freight and Local Cartage routes. But the record shows that Milstead discussed his grievance with Union representative Homer Coomer at some time prior to the June 12 meeting of the Joint Committee, and in that discussion Milstead asked Coomer for advice regarding the submission of a lengthy grievance statement he had prepared. Coomer read the statement which mentioned Milstead's work on Air Freight and Local Cartage routes. From this the jury could have inferred that the Union was placed on notice as to Milstead's problem with the separate seniority provision (presumed to have been contained in the Air Freight Agreement) but that, in spite of this notice, the Union failed to check the applicability of the provision in preparing for the grievance hearing.

The Union also contended that the separate seniority system was in effect since it had informally reached agreement with the Company on the matter. But when the Joint Committee rendered is conditional opinion on the Milstead grievance, its decision was to affirm the grievance unless the Company could show that the Air Freight Agreement was in effect. The obvious purpose behind this requirement was to verify the existence of the separate seniority agreement which would have barred Milstead's claim to regular employee status.

Thus, if an informal agreement did exist, the record does not show that anyone on the Joint Committee knew about it. Also, the jury could have inferred that Brown was unaware of any such agreement since he did not mention it when the challenge to Milstead's claim was presented.

After receiving a copy of the Air Freight Agreement from a Company representative, Brown reviewed its contents but failed to notice that the oftquoted seniority provision was missing. If Brown was not aware of the informal agreement, he may have been remiss in not noticing the absence of the seniority provision from the Air Freight Agreement. If, on the other hand, he was aware of the informal agreement, he may have breached his duty by failing to inform Milstead or the Joint Committee of it.

However, this does not necessarily imply that the Union was required to argue the absence of the seniority provision in Milstead's behalf. The Union could have refrained from arguing the point in deference to larger Union interests. As stated by the Court of Appeals for the Fifth Circuit,

> The major goal of the duty of fair representation is to identify and protect individual expectations as far as possible without undermining collective interests. Where the individual and collective group interests clash, the former must yield to the latter. Where collective bargaining agreements are executed, there may be many provisions which lead individual employees to believe they are entitled to specified benefits but, in the final analysis, the collective group interests must remain paramount. *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, 956-957 (5th Cir 1976).[7]

In this case, no analysis of competing collective and individual interests could have occurred because the Union was seeming-

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[7] *Accord*, *Vaca* v. *Sipes*, *supra*, and *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048 (1976).

ly unaware of Milstead's interest in the missing seniority provision.

With regard to the issue of damages, there is nothing in the record to support the $20,000 award assessed against the Union. In overruling Milstead's motion for attorney fees after the trial, the district court may have surmised that the jury would include within its verdict a sum representing a reasonable attorney's fee. As in *Scott* v. *Anchor Motor Freight*, 496 F.2d 276, 282 (6th Cir. 1974), *cert. denied* 419 U.S. 868, 95 S.Ct. 126 (1974),

> [t]he difficulty is that the jurors were presented with no evidence of what attorney fees were in this case, though their charge comprehend determining an amount of attorney fees. . . . The $12,500 verdict against the Union necessarily rests on a sheerly speculative foundation and cannot stand.

It is also possible that the award rendered here included some damages for lost wages. If so, the award is clearly contrary to law since judgment against the Union under the facts of this case can be had only for those damages that flowed from its own conduct, *Vaca* v. *Sipes, supra* at 196-198, 87 S.Ct. at 919-921, and *Czosek* v. *O'Mara*, 397 U.S. 25, 29, 90 S.Ct. 770, 773 (1970), and which compensate Milstead "from the Union's pocket for those expenses he incurred because of the Union's failure to process his grievance properly." *Ruzicka* v. *General Motors Corp., supra* at 312.

The judgment of the District Court determining liability of the Union for breaching its duty of fair representation is affirmed, but the judgment is vacated as to the award of damages. The cause is remanded to the District Court for determination of damages incurred by plaintiff as a proximate result of the Union's breach of its duty of fair representation, including any attorney's fees incurred as a result thereof, and said determination to be consistent with our opinion.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-82

CURTIS MILSTEAD,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION OF AMERICA, LOCAL 957, AND IRC&D MOTOR FREIGHT, INC.,

Defendants.

JUDGMENT

(Filed June 23, 1976)

This action came on for trial before the Court and a jury, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Curtis Milstead recover of defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union of America, Local 957 the sum of Twenty Thousand Dollars ($20,000.00); and recover of defendant, IRC&D Motor Freight, Inc. the sum of Ten Thousand Dollars ($10,000.00).

Dated at Dayton, Ohio, this 23rd day of June, 1976.

JOHN D. LYTER, CLERK
Clerk of Court
By: /s/ REBECCA JANE ELLIS
Deputy

Opposition

FILED
SEP 8 1981
ALEXANDER L. STEVAS
CLERK

No. 81-258

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CURTIS MILSTEAD,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 957, et al.,

Respondents.

On Petition For Writ Of Certiorari to The United States Court of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION
For Respondent International Brotherhood of Teamsters Local Union No. 957

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QUESTIONS PRESENTED

(1) Whether or not Milstead's Petition for Writ of Certiorari is timely in light of the fact that he is challenging the initial decision of the United States Court of Appeals for the Sixth Circuit rendered in August of 1978?

(2) Whether or not the Court should review a determination of the lower Court which held that, on the facts of this case, Petitioner was entitled to recover compensatory damages against the Union for expenses he incurred in his attempt to recover damages against his former employer for an unlawful discharge, but excluding back wages and fringe benefits?

(3) Whether or not the Court should review the lower Court's decision, in view of the fact that there has been no finding that the Union participated in the unlawful discharge and that Milstead has recovered against his former employer?

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BRIEF IN OPPOSITION

For Respondent International Brotherhood of Teamsters Local Union No. 957

STATEMENT OF THE CASE

This action arose under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. Petitioner Milstead sought relief from a former employer, I.R.C. & D. Motor Freight, (hereinafter sometimes referred to as Company), and Local Union No. 957 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereinafter sometimes referred to as Union and/or Respondent).

The original complaint was filed on April 9, 1975. The basic allegation of said complaint claimed a breach of the collective bargaining agreement in effect between the Company and the Union and a breach of the Union's duty of fair representation.

The gravamen of the original complaint was that the Company had violated Section 41 (a) of the National Master Freight Agreement when it decided not to use Petitioner after he had allegedly successfully completed a probationary period. Correspondingly, the Union was alleged to have breached its duty of fair representation in processing Petitioner's grievance claiming that he had attained seniority.

An amended complaint was filed on July 22, 1975. A jury trial commenced on June 21, 1976, on the allegations that the Company had violated the collective bargaining agreement and the Union had breached its duty of fair representation.

On June 23, 1976, the jury rendered a verdict in favor of the Petitioner and against both the Union and the Company. The award of damages assessed against I.R.C. & D. Motor Freight totalled Ten Thousand Dollars ($10,000.00) and the award of damages against the Union equalled Twenty Thousand Dollars ($20,000.00). Subsequently, on June 23, 1976, the United States District Court for the Southern District of Ohio entered a judgment for Petitioner in an amount set by the jury in its verdict.

A notice of appeal was filed by the Union on October 26, 1976 with an amended notice of appeal being filed on October 27, 1976 by the Union. Petitioner reached a settlement of his claim against the Company following the trial in 1976. That settlement was for Twelve Thousand Dollars ($12,000.00).

The United States Court of Appeals for the Sixth Cir-

cuit decided the appeal on or about August 2, 1978. The Court upheld the finding of liability against the Union, however, the damage award against the Union was vacated as being contrary to law. A mandate was received by the United States District Court for the Southern District of Ohio, Western Division on or about September 18, 1978. The mandate required the District Court to conduct further proceedings consistent with the opinion of the United States Court of Appeals for the Sixth Circuit in order to ascertain a proper award of damages to be assessed against the Union for breaching its duty of fair representation.

On November 12, 1979, a jury trial was held in the United States District Court for the Southern District of Ohio, Western Division, pursuant to the remand by the United States Court of Appeals for the Sixth Circuit. A jury awarded Petitioner Five Thousand Six Hundred Twenty-Five Dollars ($5,625.00).

On or about December 12, 1979, Petitioner Curtis Milstead, filed a notice of appeal. A decision was rendered by the United States Court of Appeals for the Sixth Circuit on or about May 13, 1981.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

Neither the District Court, in its refusal to permit evidence concerning lost wages, nor the Court of Appeals in its affirmation of the District Court's actions erred. The question whether or not lost wages and fringe benefits were properly includable in damages assessed against the Union for breach of its duty of fair representation, under the facts of this case, was laid to rest by the United States Court of Appeals for the Sixth Circuit in its first decision. The District Court was obligated to follow the positive dictates of the remand and conduct further proceedings consistent with the first mandate handed down by the United States Court of Appeals for the Sixth Circuit.

It is a well established jurisprudential principle that the District Court may not exceed the terms of the mandate issued by the Court of Appeals. *Briggs* v. *Pennsylvania Railroad Co.*, 334 U.S. 304, 92 L.Ed. 1403 (1947). See also, *Kansas City Southern Railway Co.* v. *Guardian Trust Co.*, 281 U.S. 1, 74 L.Ed. 659 (1929); *Sprague* v. *Ticonic National Bank*, 307 U.S. 151, 83 L.Ed. 1184 (1938); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 84 L.Ed. 657 (1939); *Thornton* v. *Carter*, 109 F.2d 316 (8th Cir. 1940); and *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674 (10th Cir. 1972).

The mandate from the United States Court of Appeals for the Sixth Circuit required the District Court to conduct a rehearing on the damage aspect of Milstead's 301 action. It clearly excluded damages for lost wages from consideration by the District Court in the second hearing. The District Court complied. The Sixth Circuit in Milstead II affirmed.

Milstead is now seeking to challenge the action of both lower Courts with regard to the exclusion of lost wages and fringe benefits from damages assessed against the Union for breach of its duty of fair representation when in fact that determination was made by the Sixth Circuit in its 1978 opinion. His challenge is clearly untimely. 28 U.S.C. § 2101 (c). The actions of the District Court in the rehearing and the Court of Appeals in affirming the District Court's conduct on rehearing were based upon the law of the case. Very simply stated, Milstead's challenge to the apportionment principle should have come after the first decision rendered by the United States Court of Appeals for the Sixth Circuit.

In view of the fact that the Petition for Writ of Certiorari has not been filed within the statutory ninety (90) day time period it must be dismissed. It is the contention of the Union in the case at bar that the only thing that can be entertained by the United States Supreme Court at this time is whether or not the District Court acted within the scope of the remand handed down by the United States Court of Appeals for the Sixth Circuit.

II

Petitioner argues that the opinion of the United States Court of Appeals is inconsistent with the law as it is developed in the Fourth Circuit, the Fifth Circuit and by the NLRB. The Respondent respectfully submits that the decision of the United States Court of Appeals for the Sixth Circuit is not inconsistent with the law as it has developed in any other circuit in regard to the apportionment of damages in a 301 action.

There is no finding in this case that the Union participated in, caused or exacerbated the discharge of the Petitioner. Therefore, the Union is liable only for damages

which flowed from its own conduct. *Vaca* v. *Sipes,* 385 U.S. 171 (1967); and *Czosek* v. *O'Mara,* 397 U.S. 25 (1970).

The opinion of the United States Court of Appeals for the Sixth Circuit is consistent with the law that has developed in the Fourth Circuit in regard to the apportionment principle. In the case of *Self* v. *Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61,* 620 F.2d 439 (4th Cir. 1980), the Court of Appeals was faced with a situation where the Union did not cause the discharge of the plaintiffs, but had been held responsible for damages including, *inter alia,* backpay. The judgment of the trial court was reversed, and the Court of Appeals held that the Union was only responsible for expenses incurred by the plaintiffs which resulted directly from the union's failure to process grievances. In a subsequent case, *Wyatt* v. *Interstate & Ocean Transportation Co.,* 623 F.2d 888, 104 LRRM 2408 (4th Cir. 1981), the United States Court of Appeals for the Fourth Circuit held that the District Court properly ordered a new trial where an improper jury instruction concerning damages was given. In doing so, the Fourth Circuit stated that a union is not liable for lost wages unless it has contributed to the wrongful discharge.

There is no such finding in the case at bar. Milstead recovered from his former employer and it was determined by a jury that he incurred Five Thousand Six Hundred Dollars ($5,600.00) in expenses because of the Union's failure to properly process his grievance. Petitioner now seeks to recover twice on the theory of lost wages and fringe benefits.

As to the case relied upon by the Petitioner from the United States Court of Appeals for the Fifth Circuit, it is the Respondent's contention that that case involved a review of an administrative decision rendered by the Na-

tional Labor Relations Board. Petitioner seeks to mix a review by the Court of Appeals of an administrative matter with a review by the Court of a judicial decision. The administrative board determination is distinct and different from the discreet cause of action that has developed under 301 for breach of contract and the duty of fair representation. Moreover, the cause is distinguishable in that case cited by Petitioner concerned direct union involvement in the unlawful situation. The decision from the Fifth Circuit cited by Petitioner does not indicate a split in the Circuits. In fact, it bolsters the Respondent's contention that absent direct Union involvement in the unlawful situation there is no liability for back wages.

Finally, the Respondent submits that the Board decision cited by Petitioner is also distinguishable from the case at bar. In any event, the determination of the National Labor Relations Board is not tantamount to a determination by a Court of Appeals and does not provide a basis for arguing a split in the Circuits.

III

The Respondent further contends that there are no novel issues to be reviewed by the United States Supreme Court. *Milstead* v. *International Brotherhood of Teamsters, Local Union No. 957* is a garden variety 301 action. The Court is faced with a situation where the United States Court of Appeals for the Sixth Circuit determined that the Union breached its duty of fair representation in processing Milstead's grievance.

There is no finding the Union was involved in the unlawful discharge. There is no finding that the Union caused the unlawful discharge. There is no finding that the Union exacerbated the unlawful situation.

The case at bar is not distinguishable from the decisions

rendered by the United States Supreme Court in *Vaca* v. *Sipes, supra; Czosek* v. *O'Mara, supra;* and *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976).

IV

The Respondent contends that the decision of the United States Court of Appeals for the Sixth Circuit concerning the apportionment principle originally handed down in August of 1978 is consistent with the law. The question of damages attributable to the Union in the case where the Union has breached its duty of fair representation was first discussed by the United States Supreme Court in *Vaca* v. *Sipes, supra*:

> "Though the Union has violated a statutory duty in failing to process the grievance, it is the Employer's unrelated breach of contract which triggered the controversy which caused this portion of the employee's damages. It could be a real hardship on the Union to pay these damages even if the Union were given a right to indemnification against the Employer. Where the employee is assured of direct recovery from the Employer, we see no merit in requiring the Union to pay the Employer's share of damages." 385 U.S. at 197, 198.

Subsequently, in *Czosek* v. *O'Mara, supra,* the Supreme Court described the Union's damage exposure as follows:

> "Assuming the wrongful discharge by the employer independent of any discriminatory conduct by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 73 LRRM at 2482.

Neither *Czosek* nor *Vaca* contemplated Union liability for back pay and/or fringe benefits. In this case, as in *Vaca,* it was the employer's unlawful action which triggered the losses suffered by Petitioner. Therefore, the Respondent's liability is limited to expenses incurred in collecting from the employer.

Milstead has repeatedly relied upon the recent United States Supreme Court decision in *IBEW* v. *Faust,* 442 U.S. 42, 60 L.Ed.2d 698 (1979). The Respondent submits that the Petitioner's reliance on the *Faust* case is misplaced.

Justice Marshall in delivering the opinion for the majority of the Court clearly defined the scope of the Faust decision as being limited to the question of punitive damages. *Faust* does not overrule the apportionment principle first set forth by the United State Supreme Court in *Vaca* and reiterated in *Czosek.*

It is also important to note at this point that the *Faust* decision was rendered on May 29, 1979. It came down approximately eight (8) months after the decision of the United States Court of Appeals for the Sixth Circuit in Milstead I. The District Court was obliged to follow the mandate of the Sixth Circuit.

CONCLUSION

The District Court, pursuant to the mandate, refused to permit the Petitioner to introduce the evidence concerning the lost wages and fringe benefits. The District Court's decision and the affirmation of the actions of the District Court by the Court of Appeals were founded upon well established legal principles. For all the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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